I ordered that the costs of this application be borne by the petitioner in any event because I did not think that counsel for the petitioner should have asked for the petition to be proceeded with in the absence of the respondent's counsel or representative especially as the petition had been adjourned for Mr Kee, the previous counsel for the petitioner, to consider the possibility of substituting creditors in place of the petitioner in the light of the withdrawal of the civil suit and the consequent destruction of the substratum of the petition.

Order accordingly.

Solicitors: *CC Kok & Yeo*; *Ong Ban Chai & Co.*

Reported by *Wong Kim Fatt*

Public Prosecutor v Chan Choon Keong & Ors

HIGH COURT (KUALA LUMPUR) – FEDERAL TERRITORY
CRIMINAL TRIAL NO 56-1-86
FAIZA TAMBY CHIK JC
21 FEBRUARY 1989

Criminal Procedure – Cautioned statement – 'Inducement' – Word 'inducement' not properly explained to accused in Hokkien – Word given by recording officer different from that given by certified court interpreter – Whether proper caution administered

Criminal Procedure – Cautioned statement – 'Oppressive circumstances' negating voluntariness – Elements of

Evidence – Child witness – Evidence to be scrutinized with special care – Need for corroboration

Evidence – Station diaries and lock-up diaries – Used for refreshing of memory rather than evidence of fact stated therein – Not public documents – Only admissible if makers of entries are called

The three accused were charged with kidnapping PW6, a six-year-old girl, an offence under s 3(1) of the Kidnapping Act 1961 read together with s 34 of the Penal Code. In the course of the prosecution's case, the prosecution sought to tender a cautioned statement purportedly made by the third accused. Defence counsel objected to the statement being used as evidence in the trial and the court ordered a trial within a trial to determine whether the statement was admissible as evidence. In the trial within a trial, the court thus had to consider (a) whether a proper caution had been given to the accused (b) whether two station diaries and one lock-up diary could be tendered as evidence (c) whether the cautioned statement was obtained under oppressive circumstances. The court then went on to deal with other aspects of the case.

Held, acquitting the first and third accused and convicting the second accused on his plea of guilty:

(1) An important word as 'inducement' which is obtainable in s 113 of the Criminal Procedure Code has to be explained and made understood to the third accused when administering the caution pursuant to that section. It will not be properly explained to and be understood by the third accused if the recording officer himself did not give the correct word for 'inducement' in Hokkien, be it common Hokkien or otherwise. In this case, the recording officer gave a word in Hokkien for 'inducement' which was different from that given by the certified court interpreter. A proper caution had thus not been administered and such caution had not been properly and fully explained so that the third accused did understand it.

(2) The lock-up register is different from the lock-up diary. Usually, these diaries are used for refreshing of memory rather than evidence of fact stated therein. Thus, station diaries and lock-up diaries are not admissible since they are not public documents and are only admissible if the makers of those entries are called.

(3) The relevant facts to be looked at in considering what are 'oppressive circumstances' negating voluntariness are: (a) characteristics of the accused; (b) period of time during which he was questioned; (c) length of time during which he was in custody; (d) whether or not he was given opportunities of rest and refreshment. Having considered all the evidence in the trial within a trial, the court has no hesitation in coming to the conclusion that the third accused was put under tremendous physical and mental pressure in order to compel him to make a statement.

(4) In dealing with the evidence of visual identification, the court has to remind itself of the special need for caution before convicting the accused in reliance on the correctness of the identification. Conflicting pieces of evidence given by two important and vital prosecution witnesses, ie the investigating officer and the officer who conducted the identification parade, were specific weaknesses in the identification evidence for the prosecution. Moreover, the identification parade was not properly conducted.

(5) PW6 was six years of age at the time of the incident and seven years of age when she gave evidence at the preliminary enquiry and is ten years of age when she gave evidence in this trial without corroboration. Whatever she said in evidence in this trial, it must be scrutinized with special care and children have the tendency to invent and distort.

(6) At the close of the prosecution's case, what has to be decided remains a question of law only. The court has only to consider whether at this stage there is some evidence, as adduced and unrebutted, which if accepted as accurate, would establish each essential element of the offence charged. In the present case, the court found no evidence at all to link the first accused and the third accused with the abduction of PW6 or with the exhibits. The court accordingly acquitted them of the offence under s 3(1) of the Kidnapping Act 1961 read with s 34 of the Penal Code.

(7) In sentencing, the court should balance between the public interest and the deterrent aims. The court accordingly sentenced the second accused to a term of six years' imprisonment to run from and be backdated to the date of his arrest and also to two strokes of whipping.

Cases referred to

1 *Datuk Mokhtar bin Hashim & Anor* v *PP* [1983] 2 MLJ 232 (refd)
2 *Tan Too Kia* v *PP* [1980] 2 MLJ 187 (refd)
3 *Poon Heong* v *PP* [1949] MLJ 114 (refd)
4 *R* v *Fulling* [1987] 2 All ER 65 (folld)
5 *R* v *Priestley* (1966) 50 Cr App R 183 (refd)
6 *R* v *Baskerville* [1916] 2 KB 658 (refd)
7 *Pritam Singh* v *PP* [1970] 2 MLJ 239 (refd)

8 *Mahbub Shah* v *King Emperor* (1945) IA Vol LXXII 148 (refd)
9 *R* v *Hale* [1974] 3 WLR 249 (refd)
10 *Haw Tua Tau* v PP [1981] 2 MLJ 49 (folld)
11 *Kenneth John Ball* (1951) 35 Cr App R 164 (refd)
12 *Ho Kin Luan & Anor* v *PP* [1959] MLJ 159 (folld)
13 *Yong Pak Yong* v *PP* [1959] MLJ 176 (folld)

Legislation referred to
Criminal Procedure Code (FMS Cap 6) s 113
Dangerous Drugs Act 1952 s 37A(l)(b)
Evidence Act 1950 ss 35, 155(c)
Kidnapping Act 1961 s 3(1)
Penal Code ss 34, 392, 397

Ahmad Rosli Sham (Deputy Public Prosecutor) for the Public Prosecutor.
Gurbachan Singh Pannu for the first and second accused.
Tong Teck Yong for the third accused.

Cur Adv Vult

Faiza Tamby Chik JC: The charge against the three accused persons is as follows:

> That you jointly on 13th December 1984 at about 9.20 pm at No 16 Jalan Awan, 18 Kampong Baru Ulu Klang in the state of Selangor in furtherance of your common intention to hold one Pheh Sau Yee aged six years for ransom did abduct the said Pheh Sau Yee and that you have thereby committed an offence punishable under s 3(1) of the Kidnapping Act 1961 to be read together with s 34 of the Penal Code.

The facts were as follows. The girl is the daughter of a well-to-do fertilizer dealer in Ulu Klang, Ampang. On 13 December 1984 she was at home watching TV with her mother (PW2) and her younger brother. Later in the evening, two classmates of her father, Ng Yong Piak alias Ng Leong Pek (PW4) and Kong See Fook dropped in to see her father. As her father Pheh Koo Seng (PW3) was not home at that time, the two friends were served with drinks and mangoes by her mother (PW2). PW4 and Kong See Fook sat till 9.15 pm when they said they wanted to go home. PW2 unlocked the door and allowed them to go. While being outside, PW2 saw another mango on the tree and wanted to pluck it and give it to them. On approaching the mango tree, this is what PW2 stated in her evidence: 'At that time, I faced the road and my back faced the house. Suddenly, someone came from behind using his hands to cover my mouth. I struggled to free myself. He then dragged me into the house and told me not to make any noise. Once I entered the house, I saw my husband's classmates had been tied up in the room downstairs – room used for watching TV.'

PW2 stated that the second accused 'placed a knife at her neck' and took her upstairs, and then came downstairs where she was asked to sit down. Later, she stated in her evidence the second accused went out to talk to the others (she earlier stated 'others' meant two or three persons) and entered the room again and told her he wanted to take her daughter away. Upon hearing this, PW2 told him she had some money in a small cabinet in the hall. On opening the drawer of the said cabinet, she stated the second accused took out $800 and seven wrist watches. Then according to PW2 the second accused asked her to go into the TV room where the two friends were already tied up and tied her up with wires. PW2 asked the second accused to bring her daughter into the TV room, but instead was gagged with a piece of cloth. PW2 further stated in her evidence: 'Then they left. I heard the sound of door has been closed. I came out of the room to see what type of vehicle used.'

Questioned by the learned DPP:

Q: Before leaving, did they say anything?
A: Yes, one of them told me to bring $60,000 at 12.00 noon at Stadium Negara car park. I do not know why.
Q: Which one told you this – the same person who took the money and who tied you up?
A: The one who took me upstairs, the one who took the money and the watches. Then I heard the sound of collapsible gate. I went out. I tried to see in what vehicle they came in. But I could not see. Then I ran to the rear portion of the house and called for my other son and daughter who were having tuition behind my house. They were Pheh Kok Wai, 16 years, and Pheh Sau Lai, 11 years.
Q: Where are your daughter Pheh Sau Yee and son?
A: My son is still with me, but my daughter has been taken away. I did not see. They took my daughter but they told me.
Q: Did you call for your son?
A: My son came and untied me.

Based on those facts, a charge under s 3(1) of the Kidnapping Act 1961 was preferred against the three accused persons, to be read together with s 34 of the Penal Code.

In the course of the prosecution's case, the prosecution sought to tender one cautioned statement purportedly made by the third accused as exhibit in support of the prosecution case. Defence counsel Mr Gurbachan Singh Pannu, counsel for the first and second accused, and Mr Tong Teck Yong, counsel for the third accused, objected to the statement being used as evidence at the trial. In view of the objection, the court ordered that a trial within a trial be held to determine whether the statement was admissible as evidence.

For the statement to be admissible, the prosecution must prove beyond reasonable doubt that the statement was made voluntarily without any inducement, threat or promise (see *Datuk Mokhtar bin Hashim & Anor* v *PP*[1]) and 'voluntariness being in issue, it was up to the prosecution to prove beyond reasonable doubt that it was voluntary' – per Suffian LP in *Tan Too Kia* v *PP*[2] at p 188.

The prosecution called Inspector Wong Siew Choon, the officer who recorded the cautioned statement of the third accused. Before going into the question of

whether the statement was voluntary or not it is relevant to consider whether a proper caution had been given to the accused and whether the recording of the statement was done in a proper manner.

In this case, Inspector Wong Siew Choon, the recording officer, said in evidence that he was fluent in common Hokkien and yet when asked to give the Hokkien word for 'inducement', it took him 25 seconds to give the word and the word he gave was different from that given by Mr Teong, the certified court interpreter. I am of the opinion such an important word as 'inducement' which is obtainable in s 113 of the Criminal Procedure Code and has to be explained and be made understood to the third accused when administering the caution pursuant to that section will not be properly explained and be understood by the third accused if the recording officer himself did not give the correct word for 'inducement' in Hokkien be it common Hokkien or otherwise. Therefore I conclude that a proper caution as envisaged by the case of *Poon Heong* v *PP*[3] had not been administered and more important such caution had not been properly and fully explained so that the third accused did understand it as Suffian LP in *Tan Too Kia* v *PP*[2] at p 188 said:

> What is important is that a person interrogated should understand the language used by the interrogator.

I am reinforced in my belief as to the insufficiency of language of the recording officer by this piece of evidence. In evidence, the recording officer admitted Lim Kim Pang has no other name or alias and the recording officer admitted in evidence Lim Kim Pang had no resemblance at all with Lim Jin Yee with which the third accused signed as his name in the cautioned statement, and yet when the third accused signed his name as Lim Jin Yee on almost every page of the cautioned statement, the recording officer did not even note this discrepancy in the cautioned statement itself or in his diary, and only explained it for the first time when it was brought up by the defence counsel in cross-examination (where the recording officer admitted in evidence he was aware of this and gave his reasons as it is common for Chinese to have aliases). I do not believe that the recording officer would not have jotted it down somewhere had he realized any discrepancy in the name from the outset.

Again in evidence the recording officer admitted he recorded the cautioned statement in question and answer form and he recorded 'everything he (third accused) said including everything I asked' and yet it was evident on the face of the cautioned statement that the third accused gave nearly five pages of answers typewritten without interruption in response to only one question: 'Could you narrate your involvement in the case concerned?' I find it incomprehensible that the cautioned statement is a verbatim recording of what the third accused said.

At this juncture, allow me to touch on two matters raised by the learned DPP Encik Ahmad Rosli. One is he applied to impeach the credit of DEW3 (a prosecution witness in the main trial PW4).

The CPC does not mention impeachment of witness except s 113 which refers to admission of statement in evidence. This is in pari materia with s 37A(1)(b) of the Dangerous Drugs Act 1952. If a person charged tenders himself as a witness, any statement of his to the police may be used in cross-examination for the purpose of impeaching his credit; and s 155(c) of the Evidence Act 1950 states: 'The credit of a witness may be impeached by the adverse party or, with the consent of the court, by the party who calls him by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.'

The fact here is this. This is the only evidence of DEW3 in this trial within a trial. If DEW3 had made a former statement inconsistent with his only evidence in court so far the former statement must be adduced in this trial within a trial, and since this is only a trial within a trial to decide the voluntariness of the cautioned statement, the former statement (which is supposed to be in contradiction with what DEW3 said here) must be relevant to the issue, that is, voluntariness of the cautioned statement. Therefore the court ruled that it could not entertain the request by the learned DPP to impeach the credit of DEW3 as there was so far at this stage of the proceeding no contradiction in his evidence in court in the trial within a trial.

The other matter is that the learned DPP wished to tender two station diaries and one lock-up diary simultaneously as evidence in the trial within a trial. On being asked by me as to whether the lock-up register is different from the lock-up diary, the learned DPP answered in the affirmative.

Police officers are required by law to make entries of their investigation. Usually these diaries are used for refreshing of memories rather than evidence of fact stated therein. In *Datuk Mokhtar Hashim* v *PP*,[1] it was held that lock-up registers at a police station were admissible under s 35 of the Evidence Act 1950 and that since such registers (I emphasize 'lock-up registers') were linked to station diaries, the relevant entries in the station diaries were also admissible under s 35 of the Evidence Act 1950. The court therefore ruled that station diaries and lock-up diaries are not admissible since they are not public documents and are only admissible if the makers of those entries are called.

Now back to the cautioned statement. The other point is whether the cautioned statement was obtained under oppressive circumstances. The relevant facts to be looked at and considered to show what are called 'oppressive circumstances' negativing voluntariness are:

(1) characteristics of the accused;
(2) period of time during which he was questioned;
(3) length of time during which he was in custody;
(4) whether or not he was given opportunities of rest and refreshment. (See Eric Cowsill and John Clegg, *Evidence: Law and Practice*, 1st Ed, 1985, at p 144).

Applying the above considerations in the instant case, let us look at the facts:

(1) The third accused was arrested on 21 December 1984 at about 3.00 am. The IO PW16 stated in his evidence that he could not deny that for 30 hours the third accused upon being arrested was put in a room (not a lock-up) and was questioned the whole night with his hands handcuffed at the back. He was only put in a lock-up in the smaller room on 22 December 1984 at 2.00 pm.
(2) The IO PW16 also admitted in his evidence that while in lock-up, the third accused was allowed only to wear underwear without shirt, without blanket, without pillow and had to sleep on the cemented floor. This was clearly in breach of lock-up Rule No 13.
(3) The IO PW16 also admitted in cross-examination that the third accused was interrogated by teams of officers headed separately by Inspector Koh and DSP Santokh Singh. These interrogations according to PW16 were for the purpose of the Emergency Ordinance and intelligence.
(4) From 21 December 1984 to 24 December 1984, there there was credible evidence that the third accused was interrogated and at one time even between 12.45 am and 1.00 am in the morning by a senior police officer and according to the third accused, during those days there were times when water was poured on his bare body which was made to face the air-conditioner. He was also forced to eat chilli padi. His request for a doctor was denied unless he co-operated with the police.
(5) The recording officer started recording the cautioned statement at 11.45 am and finished at 2.15 pm – a period of two and a half hours excluding lunch and not even going to the rest-room. It is unthinkable after what had happened to the third accused from 21 December 1984 to 24 December 1984 that he did not want any lunch or any light refreshments. Even accepting what the recording officer had stated that he did ask the third accused as to whether he wanted any lunch to which the third accused replied in the negative, the least the recording officer could do was to stop recording the statement at lunch time and continue after lunch.
(6) The IO PW16 stated in evidence that all the interrogations done by Inspector Koh and DSP Santokh Singh were without his knowledge and it was never recorded anywhere and admitted that it was possible that the police had opportunity to assault the third accused. The third accused's story that water was poured on his bare back while facing the air-conditioner and ate chilli padi during interrogation cannot be rejected just because the police witnesses denied them. The evidence of the third accused that he was ill-treated was consistent with the evidence of a witness called by the prosecution, namely, PW4. PW4 stated in a trial within a trial that after he was arrested he was interrogated by five Chinese officers and was hit on the chest and was told that if he did not co-operate they would use chilli padi to rub his private parts.

Having considered all the evidence in the trial within a trial, I have no hesitation in coming to the conclusion that the third accused was put under tremendous physical and mental pressure in order to compel him to make a statement.

I find these 'wrongful manners of exercise of authority' by the recording officer and other officers as improper, following *R* v *Fulling*[4] where it was stated at p 69: 'This in turn leads us to believe that 'oppression' ... should be given its ordinary dictionary meaning.' The *Oxford English Dictionary* had its third definition of the word 'oppression' and runs as follows:

> Exercise of authority or power in a burdensome, harsh or wrongful manner.
> Unjust or cruel treatment of subjects, inferiors, etc.
> The imposition of unreasonable or unjust burden.

Those facts as enumerated in (1) to (6) above are 'an imposition of unreasonable or unjust burden' on the third accused. As it was said in *R* v *Priestley*[5] 'oppression means something which leads to sap and has sapped that free will which must exist before a confession is voluntary.'

For the reasons I have just stated, I ruled that the cautioned statement purported to be made by the third accused was inadmissible because I was fully satisfied that the statement was not made voluntarily.

Now I come to identification. In dealing with evidence of visual identification, the court has to remind itself of the special need for caution before convicting the accused in reliance on the correctness of the identification.

PW9 conducted the identification parade on the instruction of PW16 – the IO said at the preliminary enquiry that PW2 identified the second accused Lim Eng Keong as one of the persons connected with the kidnapping case. PW9 said that PW2 could identify one person only, but the IO PW16 admitted at the preliminary enquiry that he did instruct PW9 to hold an identification parade but, however, said that PW2 identified Lim Eng Keong and Lim Song Kheng. However, PW2

admitted at the preliminary enquiry that she did not attend any identification parade. When cross-examined by the learned defence counsel, 'if you so stated (ie I did not attend any identification parade) that's the truth', she answered 'yes'.

These conflicting pieces of evidence given by two important and vital prosecution witnesses, ie the investigating officer, PW16, and PW9, the officer who conducted the identification parade, were specific weaknesses in the identification evidence for the prosecution showing the quality of the identification evidence – the poorer the quality the greater the danger.

Moreover, the identification parade was not properly conducted. The proper way was to put up each suspect separately for identification purpose with not less than nine or ten persons (see Sarkar, 13th Ed, p 99).

PW6, the victim, was the most vital witness for the prosecution. She never identified anybody. She also never identified the room where she was alleged to be held in captivity. At the preliminary enquiry, she admitted she could not remember what happened on the day of the incident. She only remembered someone took her out that night and they were Chinese – six of them. In any case, her evidence had to be corroborated. In *R* v *Baskerville*[6] Lord Reading CJ said:

> corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, ie which confirms in some material particulars not only the evidence that the crime has been committed but also that the person committed it.

Here, PW6 was six years of age at the time of the incident and seven years of age when she gave evidence at the preliminary enquiry and is ten years of age when she gave evidence in this trial without corroboration. Whatever she said in evidence in this trial, it must be scrutinized with special care and children have the tendency to invent and distort.

'Nevertheless, it is an established practice that the court will look for some corroborative particulars when the complainant is a young girl' per Abdul Hamid J (as he then was) in *Pritam Singh* v *PP*[7] at p 242.

However, PW2 had positively identified the second accused. She was subjected to vigorous cross-examination by the learned defence counsel Mr Gurbachan Singh Pannu:

> Q: You saw this one person during confused state, three or four minutes?
> A: Not really confused because I thought they came to rob. Therefore I was not frightened. For a few minutes I saw that person – five minutes more or less ...
> Q: In view of the situation that night seeing him a short while for five minutes, do you agree there is no striking distinguishing mark on the person?
> A: Yes, I can recognize him.
> Q: Do you agree with me that you can be mistaken in identifying the second accused?
> A: No.
> Q: I put it to you, you could be mistaken as to the second accused.
> A: I believe no – not mistaken.
> Q: You cannot be 100% sure?
> A: I am very sure. He spoke to me. I cannot remember identifying voices. I did not pay attention to voices.
> Q: I suggest that you cannot be very positive; you could be mistaken.
> A: I don't think so.
> Q: I put it to you, that person is not the second accused.
> A: I do not agree ...
> Q: The person you saw that night did not have the same appearance – hair like this?
> A: I cannot remember the hair.
> Q: Not hair like this?
> A: Yes, but I paid attention to features.
> Q: You agree with me the intention was to rob you of money?
> A: Yes, when he first came he asked for money and jewellery.

It is clear from the above that the credibility of PW2 was never shaken.

I shall now deal with the subject of common intention. That brings me to s 34 of the Penal Code which reads:

> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

In this connection, I would like to refer to a Privy Council case which has so often been cited in our courts. It is the case of *Mahbub Shah* v *King Emperor*[8] and the passage is at p 153 (per Sir Madhavan Nair):

> To invoke the aid of s 34 successfully it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all. If this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. That common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult, if not impossible, to procure direct evidence to prove the intention of an individual. In most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.

In simple language, if a number of persons come together and agree to commit a criminal act and proceed to commit that act, acting together, then if that act is actually committed, each and every one of them who have agreed to do the act and assisted in doing it, is guilty of the offence. The question here is 'if that act is actually committed'.

Was Pheh Sau Yee abducted on 13 December 1984 at her house, No 16 Jalan Awan 18, Kampong Baru, Ulu

Kelang? What is 'abduction'? Put simply, abduction is the act of abducting someone (especially a woman or child) away by force (*English Law Dictionary* by Peter Collin). And in *Pritam Singh* v *PP*[7] at p 240 Abdul Hamid J (as he then was) said that 'on charge of abduction, the burden is on the prosecution to prove that the taking away was by compulsion'.

In *R* v *Hale*,[9] it was held that since there was no allegation that the girl was taken or secreted by force or fraud against her will, the count disclosed no offence known to the law and accordingly would be quashed.

I must pause here and admit that this is only at the close of the case for the prosecution. There is no necessity and in fact the prosecution is not bound to prove its case at this stage beyond reasonable doubt. At this stage, the question is, is there some evidence being adduced by the prosecution that the taking away of PW6 was by compulsion and unrebutted (not inherently incredible) which if true would establish each essential element of the offence of abduction. I must and could only answer the above question in the negative.

Was ransom of $60,000 paid for her release? Again here, the question is: is there some evidence being adduced by the prosecution that the $60,000 was being paid to the accused persons to get back PW6 who has been taken away and unrebutted (not inherently incredible) which, if true, would establish each essential element of the offence of abduction. I must again answer the question in the negative.

To my mind, applying the principle enunciated in *Haw Tua Tau* v *PP*,[10] at the close of the case for the prosecution what has to be decided remains a question of law only. The sole question is: whether or not a prima facie case has been made out, ie as decider of law, I must consider whether at this stage there is some evidence as adduced and unrebutted (not inherently incredible) which if true, if believed, if accepted as accurate, would establish each essential element of the offence charged. This means acquittal may be had if those evidence as adduced by the prosecution at this stage and unrebutted are inherently incredible.

Or acquittal may also be had if those evidence as adduced by the prosecution at this stage and unrebutted though not inherently incredible have not established each essential element of the offence charged. In other words, when a prima facie case is proved, it means those evidence of facts are not inherently incredible or those evidence of facts have proved each essential element of the alleged offence. In these situations, the accused must be called upon to enter his defence.

When the prosecution closed their case in this trial, I found no evidence at all to link the first offender Chan Choon Keong and the third offender Lim Kim Pang with the abduction of the girl Pheh Sau Yee or with the exhibits. They were never identified. I could find no evidence of complicity against the first offender and the third offender for an offence under s 3(1) of the Kidnapping Act 1961 read with s 34 of the Penal Code, and I accordingly acquitted them.

Since I had acquitted the first offender Chan Choon Keong and the third offender Lim Kim Pang, I altered the charge against the second accused Lim Eng Keong which reads as follows:

> That you on December 13, 1984 at about 9.20 pm at No 16 Jalan Awan 18, Kampong Baru, Ulu Kelang, in the state of Selangor committed the theft of (1) one Rolex man's wrist watch (2) one Omega man's wrist watch (3) one Citizen man's wrist watch (4) one Citizen lady's wrist watch (5) one Seiko lady's wrist watch and cash $800 – the property of Kung Ah Yoke and Pheh Koo Seng and at the time of committing the said theft you voluntarily caused wrongful restraint to the said Kung Ah Yoke and thereby committed the offence of robbery and at that time you were armed with a deadly weapon to wit a knife and thereby committed an offence punishable under ss 392 and 397 of the Penal Code.

Upon the second accused's unequivocal plea of guilty in the presence and hearing of his counsel on the amended charge, I convicted him on his plea. In mitigation, the accused pleaded the following things:

(1) He pleaded guilty.
(2) He was a first offender.
(3) He came from aged parents of five brothers and sisters.
(4) He promised never to abuse his freedom again and turn over a new leaf. He said he was misled and now he realized his foolish acts.
(5) The five watches valued at $2,900 were recovered.
(6) No violence or brutality was involved in the incident.

I also took note of the fact that the learned DPP did not submit anything except to leave it to the discretion of the court nor did he press for stiffer punishment. To my mind, the aims of sentencing are:

(1) to rehabilitate the offender;
(2) to defend the security of society;
(3) to demonstrate the attitude of society to crime; and
(4) to deter the offender and others from crime.

The court should balance between the public interest and the deterrent aims. As was stated in *Kenneth John Ball*[11] by Hilbery J:

> In deciding the appropriate sentence, a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from com-

mitting a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe.

Now I would like to say a word about s 397 of the Penal Code. In my view, s 397 of the Penal Code does not create any offence. Its sole purpose is to administer an additional penalty of whipping on the accused.

'The modern tendency of penal procedure and reform is certainly against the imposition of corporal punishment on adults as a retrograde measure ... we acknowledge – as, indeed, we must – the fact that there may be cases which justify the courts exercising the discretion, undoubtedly vested in them, of imposing a sentence of corporal punishment even though no actual violence or brutality may have been used. We emphasize, however, that even in such cases the court should consider long and anxiously before it exercises such a discretion. Each case, of necessity, must depend upon its own facts and upon the character and antecedents of the offender.': per Thomson CJ in *Ho Kin Luan & Anor* v *PP*[12] at p 161. In *Yong Pak Yong* v *PP*,[13] it was held that in cases in which although no violence is actually used, or brutality actually shown, but where violence and brutality are undoubtedly involved (such as secret society extortion demands) the thug who has not had occasion to implement his threat of violence deserves corporal punishment just as much as if he had inflicted it.

I share those views mentioned above and I think they apply in this case. Therefore I accordingly sentence the second accused to a term of six years' imprisonment to run from and be back-dated to the date of his arrest and also to two strokes of whipping.

Order accordingly.

Solicitors: *Bachan & Kartar*; *Leonard Foo & Associate.*

Reported by *Ng Sheau Jiuan*

Ignatius Stephen Malanjum v Election Judge, Sabah & Anor

HIGH COURT (KOTA KINABALU) – ORIGINATING MOTION NO 8 OF 1988
MOHAMAD NOOR J
15 FEBRUARY 1989

Election – Election petition – Certiorari against decision of election judge – Prohibition against election judge from hearing petition – Leave to apply for – Court in which election judge sits – Whether it is an inferior court against which certiorari and prohibition can be issued – Election Offences Act 1954, ss 29, 33(1), (4) & 38(2) – Election Petition Rules 1954, r 21

Administrative Law – Certiorari against decision of election judge – Prohibition against election judge from hearing petition – Leave to apply for – Court in which election judge sits – Whether it is an inferior court against which certiorari and prohibition can be issued – Election Offences Act 1954, ss 29, 33(1), (4) & 38(2) – Election Petition Rules 1954, r 21

The applicant applied under O 53 r 1(2) of the Rules of the High Court 1980 for (a) leave to apply for an order of certiorari to quash the decision of the first respondent wherein he held that he had jurisdiction to hear Election Petition No 5 of 1985 and (b) leave to apply for an order of prohibition against the first respondent prohibiting him from hearing the said election petition. The question that came before the court was thus whether the court in which the election judge sits should, for the purposes of judicial review, be regarded as an inferior court.

Held, dismissing the application:

(1) It is manifestly clear from the relevant provisions of the Election Offences Act 1954 and the Rules that an election petition can be heard only by an election judge and by reason of expediency and convenience, other interlocutory matters in connection with an election petition including leave to amend or withdraw an election petition can be dealt with and decided by any judge of the High Court.

(2) The election judge sits in the High Court exercising his powers relating to election petitions in accordance with the election law, which is a special law. And he exercises his powers in the same jurisdiction and holds coordinate jurisdiction. Therefore the court in which the election judge sits is not an inferior court against which an order of certiorari or prohibition can be issued. The fact that under r 21, it appears that only a judge of the High Court can dispense with the required affidavit or cause shown does not alter the position because the rule is so enacted on account of expediency and convenience.

Cases referred to

1 *Re Perting Timor Election (No 2)* [1962] MLJ 333 (CA) (distd)
2 *Dason Gaban* v *Zulkifle bin Majun & 21 Other Cases* [1982] 1 MLJ 315 (FC) (distd)
3 *Tunku Abdullah* v *Ali Amberan* [1971] 1 MLJ 25 (FC) (distd)

Legislation referred to

Election Offences Act 1954 ss 29, 33(1), (4), 38(2)
Election Petition Rules 1954 r 21
Federal Constitution art 118
Rules of the High Court 1980 O 53 r 1(2)

Muhammad Shafee Abdullah (*Philip Lee* with him) for the applicant.

T Selventhiranathan (Senior Federal Counsel) for the respondents.

Cur Adv Vult